THE CONSTITUTIONAL CASE FOR CONTROLLING "TROLLING"

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The Family Law Council has become extremely concerned over the *clear and present danger* associated with solicitation of potential divorce clients with information obtained from search and review of County records involving new Divorce filings. This practice is widely referred to a "trolling" and raises serious issues for Family Law practitioners.

Personal Protection Orders and *ex parte* Orders cannot be issued by the Court without specific factual allegations of *irreparable harm*, and the Court being satisfied that the statutory mandates have been met. Accordingly, entry of an *ex parte* Personal Protection Order or issuance of an *ex parte* Order represents a threshold determination by the Court that the potential for serious physical or economic injury exists.

These Court Orders may be frustrated when the first communication to the opposing party in a Divorce case is not the Summons and Complaint and *Ex Parte* Orders but a direct, targeted solicitation from a unknown attorney. The Defendant may not know that they are the subject of a Personal Protection Order, or that a Judge is determining whether or not to issue an *Ex Parte* Order preserving the *status quo,* or preventing Domestic Violence, or precluding removal of the children from the State of Michigan.

Other serious issues can arise from a party cleaning out bank accounts, cancelling beneficiary designations, and irreparably altering the *status quo* in a Divorce case prior to being served with the Summons, Complaint, and *ex parte* Orders.

A major impetus behind efforts to address this problem was the impassioned presentation to the Family Law Council in 2008 by the Hon. John Hammond, retired judge, Berrien County Circuit Court . Judge Hammond's words that "one dead Plaintiff" is "one too many" may well be prophetic. The Family Law Council has been proactively involved in these issues for a year and a half; it recognizes its obligation to make the public and the State Bar aware of the dangers associated with *trolling*.

The Family Law Section has proposed a simple, pragmatic, and effective means of dealing with this problem: Attorneys may not solicit client representation in Family Law[1] cases until the first to occur of (a) fourteen (14) days from the filing of the Complaint or Family Law action; or, (b) the filing of a Proof of Service with the Court.

MRPC §7.3(a) is confusing, contradictory, and does not preclude *trolling*.

At first blush, the practice of *trolling* would appear to be prohibited pursuant to the Michigan Rules of Professional Conduct, specifically §7.3 (a):

> *"A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's professional gain".*
>
> However, the very same MRPC undermines this admonition at the conclusion of §7.3(a):
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> *... nor does the term "solicit" include "sending truthful and non-deceptive letters to potential clients known to face particular legal problems" as elucidated in Shapero v Kentucky Bar Assn., 496 U.S. 466, 468; 100 L. Ed. 2d 475 (1988).*

A detailed review of the Commentary to MRPC §7.3(a) fails to resolve the evident inconsistency between these two positions. This invites a review of the *Shapero* case for further guidance.

Shapero v Kentucky Bar Association did not involve restrictions on lawyer *trolling*.

Any plain reading of *Shapero* makes clear that the United States Supreme Court was concerned about a "total ban"upon lawyer solicitation:

"But merely because targeted, direct mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a ***total ban***[2] *on that mode of protected speech.*[3]"

Clearly, the fourteen (14) day restriction period is the opposite of a "total ban". Significantly, *Shapero* does not preclude state regulation of lawyer solicitation; the Supreme Court specifically set forth one mechanism of approved State regulation[4] in the form of requiring the lawyer to submit any solicitation letter with the State.

In contrast with *Shapero*, the proposal of the Family Law Council is limited to Family Law cases, and for a minimal fourteen (14) day period or actual filing of a proof of service, whichever comes first.

Minimal restrictions on lawyer solicitation meet the four prong *Commercial Free Speech* test.

Clearly, commercial speech is entitled to Constitutional protection pursuant to *Shapero, supra*. Notwithstanding, State regulation of commercial speech is permissible pursuant to a four prong test: (1) If the advertising is not accurate it can be suppressed. (2) If the Government has a *substantial interest* in the restrictions, speech can be restricted. (3) A showing that the restriction is something more than "ineffective" or "remote support" for the asserted purpose. (4) If the restriction could be the subject of a more limited restriction, it may be subject to challenge.

Subsequent to the *Central Hudson Gas*[5] case the United States Supreme Court loosened this test, and set forth the requirement that there be a "reasonable fit" between the goals and the restriction.[6]

The primary purpose of the "14 Day period" is to permit sufficient opportunity for issuance of *Ex Parte* Orders[7], obtaining entry of the Orders, and service upon the other party. A seven (7) day period would be totally inadequate under these circumstances; fourteen (14) days is a rational, limited period of time.

Significantly, the proposed restriction does **not** preclude the attorney from examining and inspecting public files and records, nor does it prohibit the direct solicitation of the prospective client. What it does do is impose the absolute minimal period of time prior an attorney being able to forward the solicitation. This "waiting period" of fourteen (14) days will be even shorter if the attorney for the Plaintiff files a Proof of Service, further reducing the impact of the restriction.

Our Michigan Court Rules intuitively recognize the problem with advance "notice"; a justification for issuance of an *ex parte* Order pursuant to MCR 3.207(B) is the fact that "notice" in and of itself might "precipitate adverse action before an order can be issued."

Suppressing all Family Law cases is neither reasonable nor cost effective.

The possibility of physical assault, kidnaping, or pillaging the marital estate is real. However, is the best alternative "suppressing" all Family Law cases? While this preemptive approach might address the problems here in Michigan, this is not a panacea: (1) Not all, most of, or very many Divorce cases will benefit from suppression. (2) It is inconceivable that Michigan County Clerks would embrace the additional cost and person-power required to effectuate this suppression. (3) File suppression directly impacts what we intuitively recognize as the "public right to know".

Conclusion: A fourteen (14) day waiting period is a narrow restriction in support of a compelling public interest.

Family law cases involve unique considerations not present in other civil matters. Personal injury cases do not normally involve assaults between family members, threats of bodily harm, pillaging of bank accounts, and the waste of the marital estate. Family law attorneys deal with these unique issues on a daily basis.

A compelling argument can be made that the *standard of care* for Family Law attorneys mandates injunctive or *ex parte* relief at the commencement of every high conflict Divorce case. However, this remedy can be totally frustrated if the Defendant who is the subject of the Personal Protection Order or the Injunction is made aware of the pendency of the action, prior to being formally served.

Is the proposal of the Family Law Council *bullet-proof*? Hardly. However, the fact that someone other than an attorney, or a newspaper, or a friend or relative may also be able to check public filings, does **not** alter the fact that Attorneys are subject to a stricter code than the public[8], and attorneys should not be actively participating in a course of conduct which will frustrate valid Court Orders and the public policy underlying Personal Protection Orders and Injunctions.

The suggestion that lawyer *trolling* "causes" assaults or kidnaping or depletions of the marital estate mis-states the issue. A *Personal Protection Order* or an *Ex Parte Order* is a piece of paper, and many violent actions occur subsequent to issuance and service of these pieces of paper.

The fact that these incidents occur is neither a barometer nor a head count on the number of assaults which are avoided because of their issuance and timely service of process. The Michigan Statutes enabling PPOs and Injunctions mirror the public policy of the State of Michigan and mandated that certain conduct must be deterred through valid Court Orders.

The Family Law Council overwhelmingly supports the adoption of a narrow window of time to obtain and serve Personal Protection Orders, Injunctions, and ex parte Orders without the "advance notice" served by *trolling* attorneys being the trigger for irreparable harm. A fourteen (14) day pause in *trolling* is a minimal restriction upon Family Law attorneys who have the privilege of practicing law in Michigan.

This proposal is narrowly drawn, and specifically geared to addressing potential violation of valid Court Orders prior to Defendants being served with legal process. Judge Hammond "got it right" when he issued the *Clarion Call* for controlling *trolling*.

Endnotes

1. The proposed waiting period would not apply to Civil litigation generally and be specifically limited to Family Law cases including Divorce, Personal Protective Order, Paternity and other related matters.

2. Emphasis added to *Shapero* excerpt.

3. *Shapero, supra*, citing *In Re MJ*, 455 U.S. at 203.

4. "The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency." *In Re MJ*, 455 U.S. at 206"

5. *Central Hudson Gas & Electric v Public Service Commission*, 447 U.S. 557, 564, 568-69 (1980),

6. *Board of Trustees v Fox*, 492 U.S. 469,480 (1989); prior decisions such as *Central Hudson Gas* have never required that the restriction be the absolutely least severe; the test is whether there is a "reasonable fit" between the government ends and means. *Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986).

7. In many Michigan Counties, the Family Law Judge will **not** immediately issue *Ex Parte* Orders, and require a day or longer to review the pleadings, Affidavits, and consider the scope of the injunction. Likewise, many *Ex Parte Orders* have to be mailed to the attorney for service, which likewise takes a couple of days for delivery; then the party must be personally served with the Summons & Complaint and *Ex Parte* Orders.

8. The permission to practice law "may rightly be regarded as a privilege"; *Falk v State Bar of Michigan*, 411 Mich 63,90 (1981). Being an attorney means being subject to many restrictions that the public as a whole is not subject to; examples include but are not limited to: self-reporting of misconduct; IOLTA requirements; free speech regarding pending cases, and countless other limitations on the conduct of attorneys.